Before The
Federal Communications Commission
Washington, DC 20554

In The Matter Of	)	
	)	
The Petition Of EchoStar	)	
Concerning The Definition	)	
Of An Over-The-Air Signal	)	RM No. 9345
Of Grade B Intensity For	)	
Purposes Of The Satellite	)	
Home Viewer Act	)	
	)	
To: The Commission	)	

COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

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Summary

The Satellite Home Viewer Copyright Act (the "Act" or the "SHVA") was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite for "private home viewing" to "unserved households," i.e., households that (1) cannot receive with a conventional outdoor rooftop antenna a signal of "Grade B intensity" from a local station affiliated with that network and (2) have not received the same network by cable within the previous 90 days.

The copyright license was narrowly crafted to facilitate satellite by delivery of broadcast network stations, while at the same time, protecting the integrity of the copyright license local stations hold for the exhibition of their network's programming within their markets. Shortly after the SHVA was enacted, it became apparent that satellite carriers were exceeding the limits of their compulsory license on a massive scale by uplinking and delivering distant network stations to households that were, plainly, not "unserved." Perhaps the most egregious violator has been EchoStar's former business partner, PrimeTime 24, which two federal courts have recently found to have violated the Act on a massive scale.

Whether a household can or cannot receive a signal of Grade B intensity from a local affiliate can only be determined by an objective signal measurement test conducted at the household. As EchoStar acknowledges in its Petition, the test set forth in the SHVA is not whether a household is *predicted* to receive a Grade B signal, but rather whether the household can *actually* receive the signal.

Despite its acknowledgment that the Act calls for actual signal measurements, EchoStar asks the Commission to engraft onto the Act a *predicted* Grade B contour standard in which 99%

of the population within the specified area is *predicted* to receive a Grade B signal 99% of the time with 99% confidence. EchoStar is asking the Commission to do that which the Commission is without authority to do.

EchoStar also asks the Commission to redefine the level of signal required to be classified as a signal of "Grade B intensity." Both the plain language of the Act and its legislative history confirm that Congress intended to adopt the Grade B signal standard that was in effect when the Act was adopted.

EchoStar is asking the Commission not to *interpret*, but rather to *rewrite*, the Act. It is a fundamental principle of constitutional and administrative law that an agency is not empowered to rewrite a federal statute. Thus, to the extent EchoStar is addressing its proposal to the Commission, rather than Congress, it is addressing the wrong forum.

EchoStar's proposal reflects a fundamental misunderstanding of the Act, its public policy objectives and the recent court decisions interpreting the Act. Enforcement of the Act, as written, will not, as EchoStar claims, result in the loss of access to broadcast network service by hundreds of thousands of satellite subscribers. In fact, enforcement of the SHVA will only result in the termination of distant network service to those who are *illegally* receiving it. These subscribers will not lose network service. By definition, they are able to receive a Grade B signal, free, from their local network affiliate. Thus, EchoStar misrepresents both the nature and effect of the recent ruling by the Miami court and the court's use of the predicted Longley-Rice contour maps. The Miami court did not substitute, as EchoStar argues, a *predicted* signal measurement methodology for the *actual* signal measurement mandated by the Act. The Miami court, in the

exercise of its equitable powers, utilized the Longley-Rice *predicted* signal methodology only as a tool to administer the Act's *actual signal measurement* requirement.

If adopted, EchoStar's proposal would greatly constrict the geographical area in which broadcast stations receive copyright protection for their network programs. Indiscriminate retransmission by satellite of duplicating network programming from distant network stations, if not checked, will undermine the economic foundation on which the nation's network/local affiliate distribution is based. Preservation of the free, over-the-air national network/local affiliate distribution system was a core policy objective of the SHVA--a fact which has been obscured by the muddled cacophony of the satellite industry's current debate. The demise of the free, over-the-air local television service would result in fewer, not more, programming choices--a result particularly harmful for those who cannot afford to pay for television service.

For these reasons, The Network Affiliated Stations Alliance urges the Commission to dismiss EchoStar's Petition.

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COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance ("NASA"), a coalition of the ABC, CBS and NBC Television Affiliate Association, hereby submits these Comments in opposition to the Petition for Declaratory Ruling and/or Rulemaking filed by EchoStar Communications Corporation ("EchoStar") on August 18, 1998 ("Petition").

I. Introduction

The Satellite Home Viewer Copyright Act (the "Act" or the "SHVA") was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite for private home viewing to subscribers who, because of distance, terrain or other factors, are unable to receive a signal of at least Grade B intensity with an outdoor rooftop antenna from a local station affiliated with that network. The Act created a limited, conditional, compulsory copyright license authorizing satellite carriers to uplink a distant network television station (without securing the station's consent and without having purchased in the open market the underlying copyrights for

the station's programming) and retransmit that station by satellite for "private home viewing" to "unserved households," i.e., households that (1) cannot receive with a conventional outdoor rooftop antenna a signal of "Grade B intensity" from a local station affiliated with that network and (2) have not received the same network by cable within the previous 90 days.[1] The copyright license was narrowly crafted to facilitate satellite delivery of broadcast network programs, while at the same time, protecting the integrity of the copyright license local stations hold for the exhibition of their network's programming within their markets. Shortly after the SHVA was enacted, it became apparent that satellite carriers were exceeding the limits of their compulsory license on a massive scale by uplinking and delivering distant network stations to households that were, plainly, not "unserved." Perhaps the most egregious violator has been EchoStar's former business associate, PrimeTime 24, which two federal courts have recently found to have abused the Act.

Until approximately two months ago, EchoStar retransmitted various broadcast network program packages provided to it by PrimeTime 24. EchoStar has severed its relationship with PrimeTime 24, and now supplies network programming to households selected on the basis of a *predictive* "red light/green light" zip code system it has created. There is no basis in the Act--or elsewhere--for the predictive subscriber eligibility standard that EchoStar is now using.

Whether a household can or cannot receive a signal of Grade B intensity from a local affiliate can *only* be determined by an objective signal measurement test conducted at the household. The test is not whether a household is *predicted* to receive a Grade B signal, but rather whether the household can *actually* receive the signal.

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[1] *See* 17 U.S.C. §119(a)(2)(A); (a)(2)(B); and (d)(10).

EchoStar is requesting the Commission to ignore the plain language of the Act which requires an *actual* signal measurement to be taken at the household and substitute in its place its newly created *predicted* Grade B contour standard. EchoStar proposes a new standard in which 99% of the households are predicted to receive a Grade B signal 99% of the time with 99% confidence. In essence, EchoStar is asking the Commission, to rescind the Act's *actual signal measurement* requirement and engraft onto the Act a self-developed *predicted* standard. EchoStar asks the Commission to redefine other parts of the Act for the purpose of weakening the copyright and exclusivity provisions of the Act and to enable it to more easily resell on a paid subscription basis the network programs that local broadcast stations provide to the public for free.

The Commission has no authority to do what EchoStar asks. The Commission cannot rewrite the SHVA. Thus, to the extent EchoStar is addressing its proposal to the Commission, rather than Congress, it is addressing the wrong forum.

We urge the Commission to dismiss the EchoStar Petition. Congress has not authorized the Commission to substitute a "predictive" signal test for the actual site measurement test required by the Act, nor to redefine the term "Grade B intensity" for purposes of the Act. Moreover, the Commission does not have the statutory authority to conduct rulemaking proceedings to interpret the *copyright* laws. And even if it were authorized to do so, there is no public policy justification for the Commission to replace an *actual* signal measurement standard with a *predicted* signal measurement standard or to redefine other provisions of the Act that would weaken the Act's network program exclusivity provisions.

A. Purpose Of The Satellite Home Viewer Act

The SHVA was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite to households that, because of distance, terrain or other factors, are unable to receive with a conventional outdoor rooftop antenna a signal of at least Grade B intensity from a local television station affiliated with that network. The Act had a dual purpose: (1) to enable households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite; and (2) to preserve the existing free, over-the-air national network/local affiliate distribution system.[2]

The Act created a limited statutory copyright--a "compulsory license"--authorizing satellite carriers to uplink a distant network station (without the station's consent and without having purchased the underlying copyrights in the station's programming) and retransmit the station by satellite to households that cannot receive the same network programming from a local network affiliate. Congress contemplated that the delivery of duplicating network programming would be confined to households located primarily in rural areas:

> "The bill will benefit 'rural America, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.'"[3]

* * *

[2] H. Rept. No. 100-887 (I) at 8 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 5577.

[3] *Id.* at 15.

"In essence, the statutory license for network signals applies in areas where the signals cannot be received via rooftop antenna or cable."[4]

* * *

"The special statutory copyright for satellite service was created 'in recognition of the fact that a *small percentage* of television households cannot now receive a clear signal of the three national television networks.'"[5]

* * *

"The extension of the SHVA 'ensure[s] that rural home satellite dish consumers will be able to continue to receive retransmitted broadcast programming. This is essential because in many rural areas satellite technologies represent the only way that rural families can receive the kind of information and entertainment programming that many urban Americans take for granted.'"[6]

* * *

"The extension of the SHVA is needed 'to ensure that rural consumers will continue to receive television programming.'"[7]

In hearings before Congress, Ralph Oman, the then Register of Copyrights, stated that only a "relatively small number of viewers would qualify under the Act for satellite delivery of broadcast network programming."[8]

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[4] *Id.*

[5] *Id.* (Emphasis added.)

[6] 140 Cong. Rec. E 1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long).

[7] 140 Cong. Rec. H 9268, H 9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes).

[8] Statement of Ralph Oman, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, 100th Cong., Jan. 27, 1988.

The Act represented a careful balance, on the one hand, between the public interest in allowing unserved households to secure access to broadcast network programming and, on the other hand, in preserving the national network/local affiliate television program distribution system by protecting the copyright held by each affiliate for exhibition of its network programming. At the heart of the Act was an acknowledgment by Congress of the national interest in preserving the longstanding, *free*, universally available, over-the-air national network/local affiliate television distribution system:

> "This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast; produces local news and other programs of special interest to its local audience, and creates an overall program schedule containing network, local and syndicated programming."
>
> * * *
>
> ". . . [T]he network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the

> values served by both centralization and decentralization in television broadcast service has served the country well."[9]
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> * * *
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> ". . . [T]he bill respects the network/affiliate relationship and promotes localism."[10]
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> * * *
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> "The Committee believes that this approach will satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system."[11]

Congress recognized that an important public interest distinction between the services offered by satellite carriers and those offered by local affiliates is that satellite services are available only to those who can afford to *pay* for them while broadcast services provided by local affiliates are *free* for everyone:

> "Free local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely."[12]

Accordingly, the assurance of continued access by the public to the nation's *free, universal, local* broadcast service was a core policy objective of the Act. Regrettably, that critical policy

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[9]H. Rept. No. 100-887 (II) at 20 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 5577. (Emphasis added.)

[10]H. Rept. No. 100-887 (I) at 14.

[11]H. Rept. No. 100-887 (II) at 19-20.

[12]H. Rept. No. 100-887 (I) at 26.

objective has been obscured in the muddled cacophony of the satellite industry's current debate.

To enable local stations to monitor compliance by satellite carriers with the limitation of their copyright, the Act required satellite carriers to furnish broadcast networks, on a monthly basis, a list of the names and addresses, including zip codes, of their new subscribers along with a list of terminated subscribers. The networks aggregate these subscriber lists, along with a list of terminated subscribers, for each local television market and provide them to their local affiliates. Each affiliate reviews the lists, and if it believes a satellite carrier is violating the terms of its statutory copyright, the affiliate may either write a letter to the satellite carrier identifying subscribers the affiliate believes do not qualify for delivery of duplicating network programming and request that the carrier terminate broadcast network service to those subscribers or the affiliate may immediately file a copyright infringement action in federal court.

The Act established a three-part test for determining whether a household qualifies for satellite broadcast service under the statutory license:

* The satellite dish must be used for "private home viewing"--thus, distant network stations may not be delivered to sports bars, lounges and restaurants.

* The receiving site must not be able to receive by the use of a conventional outdoor rooftop antenna a "measured" signal of at least Grade B intensity (as determined under Federal Communications Commission rules) from a local affiliate of the same network or from a translator carrying that affiliate, and

* The home must not have received by means of cable television a station affiliated with the same network within the 90-day period before satellite delivery of network service began.

Believing satellite carriers would follow the law and respect the limits of their statutory copyright, broadcasters did not object to the new favored copyright status for satellite carriers. Broadcasters assumed that satellite carriers would, in good faith, honor their commitment to Congress and comply with the limits of their copyright.

The Act was amended in 1994. Disputes between satellite carriers and local affiliates over the "unserved household" issue had become widespread and in an attempt to discourage satellite carriers from signing up illegal subscribers and local affiliates from making invalid challenges, the 1994 amendment added a "loser pays for the cost of measurement" provision. Under this provision, if a local broadcaster wrongfully challenges a subscriber, the broadcaster must reimburse the satellite carrier for any signal measurement costs the satellite carrier may have incurred. By the same token, if a satellite carrier wrongfully provides service to a home that does not qualify for the service, the satellite carrier must reimburse the local affiliate for any signal measurement costs the broadcaster may have incurred in measuring the signal at the subscriber's household.

The 1994 amendment also clarified that the burden of measurement and of proving whether a household can receive a Grade B signal from a local affiliate is on the satellite carrier--not the affiliate. And, for the first time, the Fox Network was covered by the Act.

B. The Broken Promise

Hardly had the ink dried on the 1988 Act when local broadcasters began to realize that satellite carriers were exceeding the limits of their compulsory license, on a massive scale, and infringing the copyright of local affiliates. Satellite carriers were marketing and selling distant

broadcast network stations indiscriminately to dish owners who could easily receive the same network from a local affiliate. As a result, NASA and the networks initiated discussions with satellite carriers shortly after the Act became law in an effort (as Congress expressly encouraged) to establish a voluntary inter-industry compliance and enforcement program. NASA and the networks continued those negotiations for several years with satellite carriers in the hope that agreement might eventually be reached on a compliance and enforcement program. A settlement and compliance agreement was finally reached with two satellite carriers (PrimeStar and Netlink) earlier this year. Regrettably, EchoStar and DirecTV refused to enter into the agreement, as did PrimeTime 24.

The deceptive advertising and trade practices of EchoStar's former business partner, PrimeTime 24, have been particularly egregious.[13] Until approximately two months ago, EchoStar relied on PrimeTime 24 as its source of distant network stations. However, almost one week after the federal district court for the Southern District of Florida issued a preliminary injunction against PrimeTime 24 in July 1998, EchoStar announced that it would no longer rely on PrimeTime 24 as its source of distant network signals and that it would do its own packaging of distant network stations. Although EchoStar has severed its relationship with PrimeTime 24, it still does not comply with the provisions of the SHVA. EchoStar has acknowledged in press releases that it determines whether customers are eligible to receive distant network signals not by measuring the signal intensity at their home as required by the Act, but rather by using its

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[13] *See CBS, Inc. et al. v. PrimeTime 24, Joint Venture*, Case No. 96-3650-CIV-Nesbitt (S.D. Fla. May 13, 1998) at 29 (stating that "PrimeTime 24 knew of the governing legal standard, but nevertheless chose to circumvent it."); *ABC, Inc. v. PrimeTime 24*, CV No. 1 97 CV 00090 (M.D.N.C. July 16, 1998), Memorandum Opinion, at 27 (holding that "no reasonable fact finder could fail to find that PrimeTime's violations of the SHVA are 'willful or repeated.'").

self-created "red light/green light" zip code system. EchoStar's failure to conduct individual signal measurement tests is particularly galling given its candid admission that "[t]he SHVA's definition of 'unserved households' incorporates the Commission's definition of Grade B intensity" which EchoStar acknowledges to be "a numerical measure found in the Commission's rules."[14] Thus, notwithstanding its arguments to the contrary, EchoStar, itself, acknowledges that compliance with the SHVA requires *actual* signal measurements at individual households, rather than reliance on a *predictive* methodology.

Countless consumers have been misled by the failure of satellite service providers and their agents and distributors to disclose fully and conspicuously the "unserved household" restrictions.[15] Satellite carriers have failed to disclose truthfully and honestly the limits of their copyright and, instead, have misled subscribers into signing up for a service they knew they did not have a copyright license to provide.

Recently, the national broadcast networks and local network affiliates began to fight back against these ongoing copyright violations in court. Copyright infringement actions were filed against EchoStar's program supplier, PrimeTime 24, in Miami, Amarillo and Raleigh-Durham. In *CBS, Inc. et al. v. PrimeTime 24*, the district court for the Southern District of Florida (the "Miami court") has issued a *preliminary* injunction prohibiting PrimeTime 24 from retransmitting CBS and Fox Network programming to any household within areas shown on Longley-Rice propagation maps that are predicted to receive a signal of at least Grade B intensity from a local CBS or Fox affiliate without obtaining the written consent of the affiliate and the network, or

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[14]EchoStar Petition at i.

[15]*See* Comments of The Network Affiliated Stations Alliance, RM No. 9335, Exhibit A.

providing the affiliate with the results of a signal strength test of the subscriber's household that establishes it cannot receive from the affiliate a signal of Grade B intensity.[16] The injunction was issued based on preliminary findings that PrimeTime 24 had "willfully and repeatedly rebroadcast copyrighted network programming to served households in violation of SHVA."[17]

As discussed in more detail, *infra*, EchoStar's Petition mischaracterizes the scope and effect of the injunction issued by the Miami court. The Miami court did not substitute, as EchoStar implies, a *predicted* signal measurement standard for an *actual* signal measurement at the subscriber's household. The Miami court, in the exercise of its equitable powers, utilized conventional Longley-Rice signal propagation maps to establish "presumptions" about where a Grade B signal may or may not be received. Under the Order, if a household is *predicted* on the basis of Longley-Rice maps not to receive at least a Grade B signal, then a presumption exists that satellite service may be provided to that household without conducting a signal measurement. The presumption may be rebutted by a local affiliate if the affiliate conducts a signal measurement which establishes that the household can receive a signal of Grade B intensity from a local affiliate. Conversely, if Longley-Rice maps predict that a household can receive a Grade B signal from a local affiliate, network service to that household may not be provided unless the satellite carrier establishes by an *actual* signal measurement that the household *cannot* receive a Grade B signal from a local affiliate. In short, the Miami court utilizes the Longley-Rice predicted signal methodology only as a tool to administer the Act's *actual signal measurement*

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[16] *CBS, Inc. et al. v. PrimeTime 24*, Order Affirming In Part And Reversing In Part Magistrate Judge Johnson's Report And Recommendation, at 34 - 35.

[17] *Id.* at 30.

requirement. It is inaccurate to suggest, as EchoStar does, that the Miami court has, in any way, departed from the Act. The Miami court could simply have ordered PrimeTime 24 to measure *every* household it serves--not just those *predicted* by Longley-Rice maps to be ineligible for satellite service. It did not and it is regrettable that its efforts to minimize the satellite industry's testing burden has been so grossly distorted and mischaracterized by EchoStar and its colleagues.

In *ABC, Inc. v. PrimeTime 24*, a North Carolina federal district court (the "North Carolina court") recently granted summary judgment in favor of ABC's Station WTVD and found from "a mountain of evidence" that PrimeTime 24 had engaged in a "pattern and practice" of copyright infringements and "willful or repeated" violations of the Act.[18] The North Carolina court, as the Act requires, issued a permanent injunction revoking PrimeTime 24's statutory compulsory license and prohibiting PrimeTime 24 from retransmitting ABC Network programming to *any* household--served or unserved--within Station WTVD's local market.[19] The North Carolina court concluded that PrimeTime 24 had abused the special statutory copyright license provided to it by Congress on a massive scale and pursuant to the Act's explicit mandate, revoked PrimeTime 24's compulsory license. We believe the FCC would have done no less in these circumstances had it, rather than the North Carolina court, been authorized by Congress to enforce the Act.

After years of trying unsuccessfully to persuade the Copyright Office, Congress and the courts to weaken the provisions of the Act that provide network program exclusivity for local network stations, the satellite industry now redirects its efforts to this Commission.

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[18] *ABC, Inc. v. PrimeTime 24*, Order, Judgment, and Permanent Injunction, at 1.

[19] *Id.* at 2.

II. The Commission Does Not Have The Authority To Grant EchoStar's Petition

EchoStar asks the Commission to do two things. First, EchoStar asks that the Commission proceed "expeditiously" to "develop a model for predicting, and rules for measuring, Grade B signal intensity for SHVA purposes."[20] EchoStar urges the Commission to adopt a predictive model that would allow satellite carriers to supply network service to households without having to conduct signal strength measurements.[21] Second, EchoStar asks that the Commission revise its numerical definition of Grade B intensity to take into account multipath interference.[22] EchoStar asserts that changed conditions necessitate a revision of the FCC's Grade B signal strength rule for purposes of the SHVA.[23] However, EchoStar acknowledges that such an undertaking will "require careful, fully informed and elaborate analysis" so it asks the Commission to redefine this term "in the long term."[24] As shown below, the Commission does not have the authority to do either of the things that EchoStar asks. The Commission cannot override the expressed will of Congress and substitute a *predicted* contour standard for the *actual* signal measurement standard set forth in the Act. Nor can the Commission alter the definition of Grade B signal intensity that was adopted by Congress.

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[20]EchoStar Petition at i, iii n. 3.

[21]*See, e.g.*, EchoStar Petition at 6.

[22]EchoStar Petition at iii n. 3, 10 - 11.

[23]EchoStar Petition at 11.

[24]EchoStar Petition at iii n. 3, 10-11.

A. The Commission Has No Authority To Rewrite The SHVA

In its Petition, EchoStar acknowledges that the SHVA's "unserved household" definition does not incorporate a *predictive* standard. EchoStar states that "[t]he SHVA's definition of 'unserved households' incorporates the Commission's definition of Grade B intensity--a numerical measure found in the Commission's rules--but does not incorporate any model for predicting or measuring that intensity"[25] and "the SHVA bases the definition of 'unserved household' on [a numerical] definition and not on any system for predicting or rules for measuring that intensity."[26] Despite its acknowledgment that Congress never intended to adopt a *predictive* standard, EchoStar asserts that the Commission has the authority to create a methodology for predicting Grade B signal intensity and to engraft it onto the Act. EchoStar does not point to anything in the Act or in its legislative history that indicates that Congress ever intended to allow the Commission to create a predictive standard. Instead, it merely asserts that such a standard is "clearly necessary" to enforce the Act.[27] EchoStar does not state why it feels a predictive standard is "clearly necessary," but it implies that the Commission should adopt a predictive standard because requiring actual signal measurements to be taken at every satellite household would be unduly burdensome for satellite carriers. For example, the Petition states "[a] model for predicting, and rules for measuring, Grade B intensity for purposes of the SHVA

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[25]EchoStar Petition at i.

[26]EchoStar Petition at 3; *see also* EchoStar Petition at 10 (stating that "the SHVA's 'unserved households' definition incorporates a measure of actual intensity from the Commission's rules; it does not incorporate the signal strength contours developed by the Commission for predicting that intensity . . .").

[27]EchoStar Petition at 6.

are clearly necessary--the alternative suggested by some is actual measurement for each and every one of millions of satellite subscribers. . . ."[28]

Whether or not adopting a predicted contour standard will make compliance with the SHVA less burdensome for satellite carriers is irrelevant. "Regardless of how convincing the Commission's policy rationales may be, the Commission is without authority to alter Congressional mandates."[29] An agency "has no authority to rewrite the statute."[30] Accordingly, the Commission may only adopt the standard proposed by EchoStar if Congress intended to allow the FCC to engraft a predictive standard onto the Act. It is evident from both the plain language of the Act and its legislative history that Congress never intended to allow the substitution of a *predicted* contour standard for the *actual* measured signal intensity standard expressly provided for in the Act.

In drafting the Act, Congress "established an objective test to determine [to] which households a satellite carrier could rebroadcast network programs."[31] This objective test is the signal strength of the local network affiliate station actually received by individual households. Accordingly, the determination of whether a household is "unserved" is an objective test that can only be made on a household-by-household basis.

The House Report accompanying the 1988 Act states that whether a household is "unserved" depends upon the measurement of the local affiliate's signal strength. For example,

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[28]EchoStar Petition at vi.

[29]*Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520 (D.C. Cir. 1995).

[30]*Asarco, Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1996).

[31]*CBS, Inc. et al. v. PrimeTime 24* at 14.

the Report says "[t]he distribution of network signals is restricted to unserved households; that is, those that are unable to receive an adequate network over-the-air signal . . ."[32] and that a subscriber's household "must be able to receive a signal of a primary network station to fall outside the definition of unserved household."[33]

In 1994 when Congress amended the SHVA, it reiterated its understanding that the determination of whether a household is "unserved" turns on signal strength measurements taken at individual households. The 1994 Senate Report states that an "unserved household" is one that cannot receive with a "conventional outdoor rooftop antenna" an over-the-air signal of Grade B intensity: "**This objective test can be accomplished by actual measurement.**"[34] Similarly, the House Report notes that "the definition of 'unserved household' in Section 119(d)(10) [of the Act] refers to the use of a conventional outdoor rooftop receiving antenna to receive 'an over-the-air signal of Grade B intensity' as defined by the FCC, thereby **requiring that the household actually receive a signal of that intensity**."[35]

Congress chose the Grade B signal intensity standard because it is a quantifiable, easily-measured standard based on actual (not predicted) reception at a specific household. Congress did not adopt a predicted service contour standard based on geographic areas. As the North Carolina court in *ABC, Inc. v. PrimeTime 24* confirmed, "the plain language of the SHVA . . .

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[32]H.R. Rep. No. 100-887 (I) at 15.

[33]H.R. Rep. No. 100-887 (II) at 26.

[34]S. Rep. No. 103-407 at 9 and n. 4. (Emphasis added.)

[35]H.R. Rep. No. 103-703 at 14 n. 6. (Emphasis added.)

requires that satellite carriers may forego signal-strength testing only at their peril."[36] Accordingly, the Commission cannot defy the expressed intent of Congress and engraft the predicted contour standard proposed by EchoStar onto the Act. It is a fundamental principle of constitutional and administrative law that an administrative agency cannot rewrite a law passed by Congress: "[H]owever reasonable the Commission's assessment, we are not at liberty to release the agency from the tie that binds it to the text Congress enacted."[37]

EchoStar does not point to anything in either the text of the Act or its legislative history to suggest that Congress ever intended that the Act would be enforced through means of a "predictive" test. In fact, the plain language of the statute--and the statute's legislative history are to the contrary. Congress clearly intended that the Act be enforced through signal strength measurements taken on a household-by-household basis. As the North Carolina court confirmed, "the plain language of the SHVA . . . requires that satellite carriers may forego signal-strength testing only at their peril."[38] Accordingly, whether the Grade B standard, Longley-Rice signal propagation maps or any other predictive model is adequate for purposes of the SHVA is a non-issue. Congress has not adopted a predictive model and never intended for such a model to be part of the Act.

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[36] *ABC, Inc. v. PrimeTime 24*, Memorandum Opinion, at 18.

[37] *Nat. Ass'n of Reg. Util Comm. v. FCC*, 880 F.2d 422, 428 (D.C. Cir. 1989). *See also, Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (criticizing agency's treatment of statute as "not an interpretation but a rewrite").

[38] *ABC, Inc. v. PrimeTime 24*, Memorandum Opinion, at 18.

B. The Satellite Industry--Including EchoStar--Is Misrepresenting The Miami And North Carolina Federal Court Decisions

EchoStar further argues that the Commission must adopt "a model predicting Signal B intensity" because the federal courts in Miami and North Carolina have misconstrued the Commission's rules regarding predictive tests and because these courts have interpreted the SHVA in disparate ways. The Petition states "the very notion that two District Courts could issue such different orders attempting to read what the Commission has or would have said on the Grade B issues underlines the need for the Commission to interpret Grade B intensity consistent with the SHVA mandate."[39] This argument mischaracterizes the holdings of both these courts. The holdings of the Miami and North Carolina courts are not at odds. Both courts held that the phrase "signal of Grade B intensity" as used in the SHVA refers to measured signal strengths (e.g., 47 dBu for low-VHF channels) set forth in the Commission's rules at 47 C.F.R. §73.683(a).[40] Contrary to EchoStar's assertions, the Miami court did not substitute a *predicted* signal measurement as set forth in the Longley-Rice contour maps for an *actual signal measurement* at the subscriber's household. Rather, the Miami court utilized the Longley-Rice predicted signal methodology merely as a "tool" to administer the Act's actual signal measurement requirement. In fact, the Miami court injunction uses the Longley-Rice maps in a manner that is *beneficial* to satellite carriers by creating a presumption that certain households receive a signal of Grade B intensity--a presumption the Act, itself, does not make. This use by the Miami court of Longley-Rice maps--which the Miami court in the exercise of its equitable

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[39]EchoStar Petition at 6 - 7. (Emphasis deleted.)

[40]*See CBS, Inc. et al. v. PrimeTime 24* at 15; *ABC, Inc. v. PrimeTime 24*, Memorandum Opinion, at 13.

power may do to facilitate compliance with its injunction--is *advantageous* to satellite carriers. It is the ultimate irony that EchoStar, NRTC and the satellite industry are now whining about it--and representing this aspect of the Miami court's order to be something it, plainly, is not.

It is unfortunate that the satellite industry--including its trade association, the National Rural Telecommunications Association, EchoStar and others--has so grossly misrepresented the holdings of the Miami and North Carolina courts. These misrepresentations have been made by the satellite industry to Congress, to the Commission and to the public at large in the satellite industry's various web sites. This surely must come to an end.

Here are the facts. The plaintiffs in the Miami case alleged "individual" violations of the Act and requested injunctive relief to prohibit PrimeTime 24 from serving homes that can actually receive (as confirmed by a signal measurement) a signal of Grade B intensity from a local affiliate of the relevant network. To assist PrimeTime 24--and to *lessen* PrimeTime 24's signal testing burden--the plaintiffs recommended and the Miami court agreed to employ Longley-Rice maps to create a *presumption* of where local signals can and cannot be received. The presumption can be rebutted with actual signal measurements. Thus, if PrimeTime 24 can show by actual signal measurements that the subscribers whose service is "presumed" to be in violation of the Act and thus must be terminated cannot, in fact, receive a Grade B signal from a local affiliate, PrimeTime 24 is not required to terminate service to any of those subscribers.

PrimeTime 24 has had three months from the date of the Miami court's order in which to conduct these tests and, by agreement, the plaintiffs have extended that date by another four months. In fact, PrimeTime 24 has had *years* (from the date service was first begun to these subscribers) in which to determine the eligibility of these subscribers, and during all that time,